



ATTORNEY GENERAL OF TEXAS
G R E G A B B O T T

February 12, 2004

Mr. Edward M. Sosa
Chief Legal Officer
County of El Paso
4815 Alameda, 8th Floor, Ste. B
El Paso, Texas 79905

OR2004-1062

Dear Mr. Sosa:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 196155.

The R.E. Thomason General Hospital, which is owned and operated by the El Paso County Hospital District (the "district") received a request for information pertaining to a specified Request for Proposals ("RFP") and the names and titles of all members of the district's Finance Committee. You state, and provide documentation showing, that some of the requested information has been provided to the requestor. You claim, however, that the remaining requested information is excepted from disclosure pursuant to section 552.104 of the Government Code. Pursuant to section 552.305 of the Government Code, the district notified three interested third parties, JP Morgan Chase Bank ("JP Morgan"), Wells Fargo Bank ("Wells Fargo"), and First Southwest Asset Management, Inc. ("First Southwest"), of the district's receipt of this request and of each company's right to submit arguments to us as to why any portion of the requested information relating to each company should not be released to the requestor. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act ("Act") in certain circumstances). We have considered the exception you claim and have reviewed the submitted information.

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of

this letter, JP Morgan, Wells Fargo, and First Southwest have not submitted comments to this office explaining why any portion of the submitted information relating to each company should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information relating to these companies would implicate their proprietary interests. *See, e.g.*, Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we conclude that the district may not withhold any portion of the submitted information on the basis of any proprietary interest that each of these companies may have in the information.

You claim that the entirety of the submitted information is excepted from disclosure pursuant to section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Generally, section 552.104 does not except information relating to competitive bidding situations once a contract is in effect. *See id.*

In this instance, you state that no final selection has been made with respect to the RFP and that no contract has been executed. You indicate that the release of the submitted information before the selection process has been concluded with respect to this RFP could give an advantage to the requestor in this selection process. Based on your arguments and our review of the submitted information, we conclude that the district may withhold the submitted information pursuant to section 552.104 of the Government Code.

You also request that we issue the district a previous determination that would allow it in the future to withhold information relating to competition or bidding in response to requests for such information without the necessity of seeking a ruling from this office. We decline to issue such a previous determination at this time.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

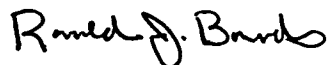
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 196155

Enc. Submitted documents

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